

INNOVATION MESA BUSINESS ACCELERATOR PROJECT

INTERGOVERNMENTAL AGREEMENT

between
Arizona Board of Regents for and on behalf of Northern Arizona University
and
City of Flagstaff

This agreement (“Agreement”) is entered into this 1st day of April, 2014, between the Arizona Board of Regents for and on behalf of Northern Arizona University (“University”), and the City of Flagstaff (“City”). The University and the City may be referred to in this Agreement collectively as the “parties” and singularly as a “party.”

WHEREAS, the City is designing, constructing and operating a business accelerator called the Innovation Mesa Business Accelerator (the “Project”) for the purpose of retaining, expanding and diversifying the economic base of the City and the surrounding area; and

WHEREAS, the Project will include an approximately twenty-five thousand (25,000) square foot “Tier Two” business accelerator facility (“Project Facility”) featuring wet and dry labs, office space, light manufacturing space, a conference room, and server facilities, to be constructed on the McMillan Mesa in the City of Flagstaff, at a total project cost of Seven Million Seven Hundred Sixty-Two Thousand Five Hundred Dollars (\$7,762,500), which is intended to assist Tier Two companies (companies that have sustainable revenues, with infrastructure needs, are adding employees, and are less than 10 years old) by making available, among other benefits: (a) various advanced venture acceleration services to regional tier-two companies including (i) access to the technical expertise, mentoring, and consulting of the University’s business and engineering faculty, economic development practitioners, research faculty, MBA and engineering graduate students, and interns; (ii) intellectual property and technology transfer capabilities; (iii) connections to local, state, and national business incubation resources; (iv) assistance and access to capital in the form of grants from agencies including the EDA (as defined below), the National Science Foundation, the National Institutes of Health, the U.S. Department of Commerce, and the Small Business Innovation Research Program; (v) access to capital from angel and venture investors; (vi) mentoring from a network of professionals including patent attorneys, certified public accountants, experienced entrepreneurs, engineers, and sales and marketing professionals; and (vii) incubation coaching and oversight; and (b) cutting-edge laboratory, production, and manufacturing infrastructure and advanced technology and equipment. With the exception of (a) (i) of this section, all benefits will be the responsibility of the City; and

WHEREAS, the Project will provide space for Tier Two companies and graduates of the Northern Arizona Center for Entrepreneurship and Technology (“NACET”), assisting business startups, and retaining and expanding existing businesses; and

WHEREAS, the City obtained funding from the United States Department of Commerce Economic Development Administration (“EDA”) and the City Council approved that grant on

November 6, 2012 to partially fund the Project; and

WHEREAS, the University has long been a driver of economic activity in rural Northern Arizona. Its constituent organizations, including the W.A. Franke College of Business, the NAU Center for Business Outreach, the NAU Office of Economic Development, the NAU Center for American Indian Economic Development, the NAU EDA University Center, and the NAU Rural Policy Institute, are innovators in entrepreneurial education and training, business outreach, business service and engagement, direct job creation, technology transfer, and business retention and expansion; and

WHEREAS, the University has been engaged in business and venture incubation and venture acceleration in rural northern Arizona, directly, and through an agreement with NACET and the City; and

WHEREAS, business incubation and venture acceleration are regarded as critical components for economic growth in rural northern Arizona in view of the region's expanding knowledge-based economy in the biosciences, technology, science-based companies, software, advanced manufacturing, astronomical sciences, education and medical services; and

WHEREAS, the University made a proposal to the Arizona Commerce Authority ("ACA") to assist in the development and operation of an expanded advanced venture acceleration program to accelerate the growth and sustainability of Tier Two start-up companies in rural northern Arizona (see Exhibit A, "Venture Acceleration Proposal," attached hereto and incorporated by this reference); and

WHEREAS, the University received a grant from the ACA to strengthen Arizona's economy and facilitate the creation of Qualified Jobs as defined in the ACA Agreement (see Exhibit B, the "ACA Agreement," attached hereto and incorporated by this reference) for its citizens by supporting and attracting businesses in targeted, high-value base sectors throughout the state under the ACA Agreement; and

WHEREAS, the University wishes to provide the funds it will receive from the ACA to support the Project, as well as additional University funding, in order to help create jobs for University graduates and to assist the University in fulfilling its teaching, research, and service missions; and

WHEREAS, the Project is anticipated to create and maintain three hundred (300) or more new Qualified Jobs over the next five (5) years;

NOW THEREFORE, the parties agree as follows:

1. University's Obligation

The University will provide to the City, from funds provided by ACA, up to one million dollars (\$1,000,000) for the purpose of funding the design and construction of the Project Facility. Provided the terms of this Agreement are complied with, the University will

reimburse the City one hundred percent (100%) of the funds that it receives from the ACA within thirty (30) days of receipt of the funds from the ACA by the University. In addition, provided the terms of this Agreement are complied with, the University will pay one hundred thousand dollars (\$100,000) for the purpose of funding the design and construction Project Facility within thirty (30) days of the signing of this Agreement.

2. City's Obligation

The City will use the funds received from the University only for the purpose of funding the design and construction of the Project Facility. All requests for reimbursement from the City to the University shall include copies of applicable vendors' invoices detailing the services provided in respect to the Project Facility, including invoices from the City if the City is performing vendor services, as well as the related proof of payment by the City, and must be acknowledged and approved by the City as representing an accurate accounting of design or construction expenses incurred in respect to the Project Facility. With the exception of the one hundred thousand dollars (\$100,000) referenced in Section 1 above, it is expressly provided that the University need not first pay the City the amount reflected in the request for reimbursement unless the University has received such amount from ACA.

The City will comply with and perform all obligations that are imposed upon the University in the ACA Agreement to the same extent that the obligations apply to the University. These obligations include, but are not limited to: designing and constructing the Project Facility; providing advanced venture acceleration and related services; preparing progress reports; access for site visits; preparing and transmitting written requests for payments; repayment for failure to meet obligations of the ACA Agreement; preparing closing affidavits and payment affidavits in substantially the form set forth in Exhibits C and D, respectively, attached hereto and incorporated herein; and providing copies of construction contracts.

The City will provide the University with copies of progress reports provided to the EDA, at the same time such reports are provided to the EDA, so that the University can provide such reports to the ACA.

The City agrees to maintain a formal business incubation and venture acceleration program run by NACET or by an entity of similar capacity (having similar credentials and capability) to NACET for at least the longer of: 1) the term of the ACA Agreement; or 2) through the Maturity Date (as defined in the ACA Agreement) or such other time as may be mutually agreed upon by the Parties.

To the extent the ACA requires repayment from the University, the City agrees to repay all monies received from the University in the event it fails to expend all monies received from the University to the design and construction of the Project Facility or fails to provide advanced venture acceleration and related services to the Project throughout the Term of this Agreement.

3. Term

The term of this Agreement shall begin on the date indicated in the first paragraph above and

shall continue until the longer of: 1) the termination of the ACA Agreement; or 2) the Maturity Date (as defined in the ACA Agreement) or such other time as may be mutually agreed upon by the Parties.

4. Representations and Warranties of the City and the University

The Parties hereby represent and warrant to each other that as of the date of execution of this Agreement and as of the time immediately preceding any payment by the University as follows:

All information supplied or delivered by the Parties to each other, whether verbally or in writing, in connection with the transactions contemplated by this Agreement is materially true, correct, and complete as of the dates specified therein.

There are no actions, suits, or proceedings pending or, to each Party's knowledge after due inquiry, threatened in any court or before or by any governmental authority which materially and adversely (i) affect that Party's ability to perform its obligations under the Agreement, (ii) affect the ability to construct and develop the Project, or (iii) which involve the validity, enforceability, or priority of any provision of this Agreement.

This Agreement constitutes a valid and binding obligation of each Party to the other, enforceable in accordance with its terms.

Each Party has the organizational power and authority to enter into this Agreement and to carry out the transactions contemplated to be carried out hereunder. The individuals signing this Agreement on behalf of each Party have full organizational power and authority to do so. All necessary consents, approvals, resolutions and other action required to duly authorize, execute and deliver the Agreement and to perform hereunder, to the extent required by each Party for such authorization, execution, delivery and performance hereunder, have been obtained or taken by that Party.

5. Insurance

The City shall maintain adequate insurance (which may include a bona fide self-insurance program) to cover any liability arising from the acts and omissions of City employees, contractors, or agents.

6. Indemnification

The City (as "Indemnitor") agrees to indemnify, defend, and hold harmless the University, the State of Arizona, the ACA and their officers, agents and employees (as "Indemnitee"), from and against any and all claims, losses, liability, costs, or expenses, including reasonable legal fees and expenses, arising from the City's performance under this Agreement to the fullest extent allowed by law. This includes, but is not limited to, any liability the Indemnitee may incur that is in any way associated with the ACA Agreement. Upon receiving knowledge of any suit, claim, or demand asserted by a third party that the University believes is covered by this indemnity, the University shall give the City prompt notice of the matter and an opportunity to defend the Indemnitee, at the City's sole cost and expense. The

University shall be responsible for complete and active cooperation with the City in defense of such claims, suits, or demands, without compensation from the City. The University shall not settle any such claims, suits, or demands without prior written consent of the City. The City shall pay any and all valid claims, suits, or demands of any brokers or agents with whom it has dealt who claim a right to any fees in connection with arranging any financing created pursuant to this Agreement or otherwise arising in connection with the Project, and shall hold the University harmless from such claims, suits, or demands, whether or not they are valid. This obligation shall survive the termination of this Agreement.

7. Cancellation for Lack of Funding

If the University's performance under this Agreement depends upon the appropriation of funds by the Arizona legislature, and if the Legislature fails to appropriate the funds necessary for performance, then the University may provide written notice of this to the City and cancel this Agreement without further obligation of the University. Appropriation is a legislative act and is beyond the control of the University.

8. Authority

The Parties represent and warrant that they are authorized and have the authority to legally undertake the obligations created under this Agreement, including but not limited to those in Section 6, Indemnification.

9. Miscellaneous

9.1 Amendments; Modifications. No provision of this Agreement may be amended or modified, except by written instrument executed by both Parties.

9.2 Limited Severability. The Parties believe that the execution, delivery, and performance of this Agreement are in compliance with all applicable laws. However, in the unlikely event that any provision of this Agreement is declared void or unenforceable (or is construed as requiring either Party to do any act in violation of any applicable laws, constitutional provision, law, regulation, code or charter), such provision shall be deemed severed from this Agreement, and this Agreement shall otherwise remain in full force and effect; provided that this Agreement shall retroactively be deemed reformed to the extent reasonably possible in such a manner so that the reformed agreement (and any related agreements effective as of the same date) provide essentially the same rights and benefits (economic and otherwise) to the Parties as if such severance and reformation were not required. Unless prohibited by applicable laws, the Parties further shall perform all acts and execute all amendments, instruments, and consents necessary to accomplish and to give effect to the purposes of this Agreement, as reformed.

9.3 No Waiver; the Parties' Standard for Consents. No waiver by either Party of any of that Party's rights or remedies hereunder, shall be considered a waiver of any other or subsequent right or remedy of either Party; no delay or omission in the exercise or enforcement by either Party of any rights or remedies shall be construed as a waiver of any

other right or remedy of either Party; and, to the extent permitted by applicable law, no exercise of enforcement of any such rights or remedies shall be held to exhaust any right or remedy of either Party. Unless otherwise provided in this Agreement, all consents of either Party permitted or required under this Agreement shall be given or withheld in that Party's sole discretion.

- 9.4 Confidentiality. The Parties acknowledge the University and the City are public entities subject to the provisions of the Arizona Public Records Laws, A.R.S. § 39-121 et seq. In the event that a public records request is received by the University or the City requesting records described as confidential, which the University or the City determines must be disclosed, the University or the City shall notify the other party prior to disclosure. The obligations under this subsection shall survive the termination of this Agreement.
- 9.5 No Third Party Beneficiary. This Agreement is for the sole benefit of the University and City and, except insofar as it relates to the Indemnitees, is not for the benefit of any third party.
- 9.6 Number and Gender. Whenever used herein, the singular number shall include the plural and the singular and the use of any gender shall be applicable to all genders.
- 9.7 Captions. The captions, headings, and arrangements used in this Agreement are for convenience only and do not in any way affect, limit, amplify, or modify the terms and provisions hereof.
- 9.8 Governing Law; Venue. This Agreement shall be deemed to be made under, shall be construed in accordance with, and shall be governed by the internal, substantive laws of the State of Arizona (without reference to conflict of law principles). Any action brought to interpret, enforce or construe any provision of this Agreement shall be commenced and maintained solely and exclusively in the Superior Court of the State of Arizona in and for the County of Coconino (or, as may be appropriate, in the Justice Courts of Coconino County, Arizona, or in the United States District Court for the District of Arizona). The Parties may, by mutual agreement, transfer or remove any action commenced under or in connection with this Agreement.
- 9.9 Time of the Essence. Time is of the essence with respect to each and every term and condition of this Agreement to be performed by the City hereunder.
- 9.10 Attorneys' Fees. In the event of a breach by any Party of any provision of this Agreement and commencement of a subsequent legal action in an appropriate forum, or in the event of an action seeking a declaration of the rights or liabilities of the Parties, the prevailing Party in any such dispute shall be entitled to reimbursement of its reasonable attorney's fees and court costs, including, but not limited to, its costs of expert witnesses, transportation, lodging and meal costs of the parties and witnesses, costs of transcript preparation, and other reasonable and necessary direct and incidental costs of such dispute.

- 9.11 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall be deemed one and the same document.
- 9.12 Recitals. The Recitals are incorporated herein by this reference and made an integral part hereof.
- 9.13 Conflict of Interest. The requirements of A.R.S. § 38-511 apply to this Agreement.
- 9.14 Compliance with the Law. The City shall promptly execute and comply with A.R.S. § 41-4401, immigration laws and E-Verify requirement. The City warrants compliance with all federal immigration laws and regulations relating to its employees and warrants compliance with A.R.S. § 23-214. A breach of the City's warranty regarding compliance with immigration laws and regulations shall be deemed a material breach of this Agreement and the University, in such event, may terminate this Agreement; provided, however, that the University shall not deem the City to be in material breach of the Agreement if it has complied with the employment verification provisions prescribed by sections 274a and 274b of the Federal Immigration and Nationality Act and the E-Verify requirements prescribed by A.R.S. § 23-214, subsection A. The University retains the legal right to inspect the papers of any employee who works on this Agreement to ensure the City is in compliance with the City's warranty under this paragraph.
- 9.15 No Assignment. The Parties acknowledge that this Agreement is personal to the City and is based solely and exclusively upon factors relevant to the City's unique qualifications and experience, and that the City may not assign or transfer (which shall include but not be limited to encumbering or hypothecating), in whole or in part, this Agreement, or its rights or obligations arising under this Agreement (including its right to receive any funds or other monies payable hereunder), in whole or in part, to any other person or entity, or for any purpose not specified herein, without the prior written consent of the University, which may be granted, withheld, delayed or conditioned in the University's sole, absolute and unfettered discretion. Any assignment, or attempted or purported assignment, in violation of this Section shall be void, and not voidable, and shall vest no rights in the purported assignee or transferee.
- 9.16 Successors Bound. This Agreement shall inure to the benefit of, and shall be binding upon, each of the Parties and their successors and assigns hereunder.
- 9.17 Force Majeure. Each Party shall be excused from performance in its obligations hereunder to the extent such failure to perform is caused by an event of "Force Majeure." "Force Majeure" means the actual period of any delay caused by any legal challenges or defenses to the actions taken or to be taken in connection with this Agreement, condemnation, strike or labor disputes, unavailability of materials, extraordinarily severe weather conditions, riot or civil disorder, other acts of God or other cause beyond such party's reasonable control. The party claiming Force Majeure shall give prompt written notice to the other party of the occurrence of such Force Majeure and shall use reasonable efforts to remove or minimize its effects forthwith.

9.18 Entire Agreement. This Agreement contains the entire agreement of the Parties with respect to the subject matter hereof.

10. Authority

The Parties represent and warrant that they are authorized and have the authority to legally undertake the obligations created under this Agreement, including but not limited to those in Section 6, Indemnification.

11. Notices

Except as otherwise expressly provided herein, all notices, demands, requests, and other communications required or permitted hereunder, shall be in writing and shall be delivered by hand, telegram, facsimile or deposited with the United States Postal Service postage prepaid, registered or certified mail, return receipt requested, or delivered by courier or personal delivery addressed as follows:

If to the City:

Attn: City Manager
City of Flagstaff
211 W. Aspen St.
Flagstaff, Arizona 86001
Telephone No.: (928) 213-2000

With a required copy to:

Attn: Grants Manager
City of Flagstaff
211 W. Aspen St.
Flagstaff, Arizona 86001
Telephone No.: (928) 213-2227

If to University:

Attn: Jennus Burton
Vice President, Finance and Administration
Northern Arizona University
PO Box 4088
Flagstaff, Arizona 86011-4088
Telephone No.: 928-523-2708
Facsimile No.: 928-523-4230

with a required copy to:

Rich Bowen
Associate Vice President, Economic Development
Northern Arizona University
PO Box 4074
Flagstaff, AZ 86011-4074
Telephone No.: 928-523-8831
Facsimile No.: 928 -523-8223

12. Order of Precedence

To the extent there is a conflict between this Agreement and the attachments to this Agreement, the ACA Agreement will control, followed by the Venture Acceleration Proposal, and then this Agreement.

13. Definitions

To the extent applicable and except as otherwise set forth in this Agreement, the definitions in the ACA Agreement shall apply to this Agreement.

The undersigned have read the foregoing Agreement and, as duly authorized signatories of their respective entities, hereby agree to be bound by its requirements, terms and conditions.

**The Arizona Board of Regents for and on
Behalf of Northern Arizona University**

City of Flagstaff

By: _____
President John Haeger

By: _____
Mayor Gerald W. Nabours

Approved as to form:

Attest:

Attorney for the Board of Regents

City Clerk

Approved as to form:

City Attorney

Exhibit C

CLOSING AFFIDAVIT

The undersigned hereby certifies that he/she is the _____ of the City of Flagstaff (“City”), and is authorized to deliver this affidavit for and on behalf of the City; and further declares, solely in such capacity for the City and not individually, that:

1. The undersigned has examined the agreement dated April 1, 2014, by and between the City and the Arizona Board of Regents, for and on behalf of Northern Arizona University (“Agreement”).
2. To the knowledge of the undersigned, the representations and warranties of the City set forth in Article 4 of the Agreement are true and correct in all material respects.

Executed this ___ day of _____, 2014.

By: _____

Name: _____

Its: _____

STATE OF ARIZONA)
) ss.
 County of Coconino)

On _____, 2014, before me, the undersigned Notary Public, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument the person or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Notary Public

My Commission Expires:

Exhibit D

PAYMENT AFFIDAVIT

The undersigned hereby certifies that he/she is the _____ of the City of Flagstaff (“City”), and is authorized to deliver this affidavit for and on behalf of the City; and further declares, solely in such capacity for the City and not individually, as set forth below. (All capitalized terms mean as defined in the Agreement between the City and the Arizona Board of Regents, for and on behalf of Northern Arizona University (“the University”) dated April 1, 2014 (the “Agreement”).)

1. To the knowledge of the undersigned, the representations and warranties of the City set forth in Article 4 of the Agreement remain true and correct in all material respects.

2. No Event of Default exists, and no event of non-performance exists, which, with the passage of time, could constitute an Event of Default. Among other matters, the City has submitted all Progress Reports due as of the date hereof.

3. No Material Adverse Change has occurred either in respect to the City or in respect to the Project since the date of the Agreement.

4. The City has furnished the University with copies of all construction contracts for the Project Facility and all amendments thereto.

5. Attached is all documentation referenced by Section 3.1 of the ACA Agreement which corroborates the amount of the payment requested from the University.

Executed this ____ day of _____, 20__.

By: _____

Name: _____

Its: _____

STATE OF ARIZONA)
) ss.
County of Coconino)

On _____, 20__, before me, the undersigned Notary Public, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument the person or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Notary Public

My Commission Expires: